

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SCOTT L. REYNOLDS**

Claimant

VS.

**CENTER INDUSTRIES CORPORATION**

Respondent

AND

**SENTINEL INSURANCE CO. LTD**

Insurance Carrier

Docket No. 1,055,269

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the June 23, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Tamara J. Collins, of Wichita, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent.

In his Application for Hearing, claimant alleged 3 separate and distinct accidents and injuries: First, a series of accidents beginning November 24, 2010, and continuing each and every working day thereafter resulting in injuries to claimant's bilateral wrists and left forearm. Second, a series of accidents beginning January 17, 2011, and continuing each and every working day thereafter resulting in unspecified injuries. And third, an accident on March 22, 2011, resulting in a left knee injury.<sup>1</sup> At the Preliminary Hearing, claimant alleged both the first and second series of accidents resulted in the injuries to the left wrist, left forearm and right forearm. Respondent admitted claimant suffered left wrist and right forearm injuries on November 24, 2010 and January 17, 2011, but denied there were a series of accidents and denied the left knee injury arose out of the employment. Respondent neither admitted, nor denied the alleged injuries to the right arm.

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<sup>1</sup> E-1 Application for Hearing (filed Apr. 5, 2011).

The Administrative Law Judge (ALJ) found claimant's injuries to his left upper extremity and left knee arose out of and in the course of his employment with respondent on November 24, 2010, and March 22, 2011. The ALJ ordered respondent to furnish the names of three physicians for selection of one by claimant to be his authorized treating physician. All medical was ordered paid. The ALJ also ordered temporary total disability benefits to be paid from March 28, 2011, to June 1, 2011, and to be paid by respondent in the future if the authorized treating physician takes claimant off work or places restrictions on claimant that are not accommodated by respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 23, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### **ISSUES**

Respondent argues that claimant's left lower extremity injury and related complaints, symptoms and need for treatment did not arise out of and in the course of his employment. Respondent contends claimant fell due to an idiopathic condition and not a work-related event or condition. Respondent does not challenge the ALJ's finding that claimant suffered an injury to his left upper extremity on or about November 24, 2010, or the finding that claimant did not sustain an injury to his right upper extremity.<sup>2</sup>

Claimant argues that in addition to his left upper extremity injury of November 24, 2010, he likewise sustained his burden of proving he suffered a work-related injury to his left knee on March 22, 2011, that arose out of and in the course of his employment with respondent.<sup>3</sup>

The issue for the Board's review is: Did claimant suffer an injury or injuries to his left lower extremity on or about March 22, 2011, that arose out of and in the course of his employment with respondent?

### **FINDINGS OF FACT**

Claimant is a 27-year old man who has suffered from cerebral palsy since birth. He began working for respondent in May 2010. He worked in the 30-round department assembling parts. At the Preliminary Hearing, claimant described three accidents that occurred while working for respondent. On November 24, 2010, claimant injured his left wrist while lifting a box. He was sent to HMA MedWorks (MedWorks) for treatment and was given a wrist brace to wear. Claimant contends his right arm starting hurting him later

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<sup>2</sup> Actually, the ALJ's Order was silent as to the right upper extremity.

<sup>3</sup> The alleged right upper extremity injury does not appear to be an issue in this appeal.

and he reported it to the doctor, but he did not know if the report got back to respondent. On January 17, 2011, claimant reported an injury to his left forearm after lifting a box over his head. His left wrist popped, and he was again sent to MedWorks. He was given a band to wear around his left forearm.

Claimant's third claimed injury occurred March 22, 2011. Claimant contends he was walking to the rest room when his right knee locked up. He took two steps, and his knee unlocked. He took three more steps, and he tripped over a crack in the concrete. Claimant said he was not looking where he was going, and because of his cerebral palsy he sometimes drags his feet. After he tripped, he fell, and all his weight landed on his left knee. He reported the injury to one of the lead workers. He was sent to MedWorks, where he was given a brace and put on crutches. He received no more treatment, because his workers compensation claim was denied. He was told his claim was denied because he had a preexisting injury. Claimant said he was terminated on March 28, 2011.<sup>4</sup>

Claimant said he has had two previous operations on his left knee. The latest was in 2003, when he had cartilage repair of his left knee. He said after the surgery, he had no problems with his knee until his accident in March 2011 except for a couple of times when he hyperextended the knee. On cross-examination, claimant admitted he was having some issues with his knees at the time he applied for the job with respondent. However, he said the pressure he was feeling behind his knee was nothing like the pain he is now having.

Claimant admitted that in July 2010, he indicated he needed an operation on his left knee on a form he filled out for MedWorks. He explained that no physician had advised him he needed an operation, but he thought he needed one. On July 12, 2010, Via Christi Specialty Clinics provided claimant with a slip excusing him from work from because "he was at the orthopedic clinic for evaluation of [left] knee pain."<sup>5</sup> Claimant said he had gone to the clinic for sporadic pain and it had nothing to do with what happened to him at work. He said x-rays and a CAT scan were taken, and nothing was found to be wrong with his left knee. He had no further treatment and was fine until his fall at work.

Claimant stated his right knee would lock up on him every once in a while. But he said concerning his fall in March 2011 that his knee locked up, then unlocked, and then he was walking fine for a few steps before he tripped. He also said that he has had problems with his right foot dragging all his life. The foot dragging is because of his cerebral palsy.

Nikki Burris is respondent's human resources manager. She stated that on November 24, 2010, claimant began feeling pain in his left wrist. He reported the pain to

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<sup>4</sup> Respondent's Separation Statement concerning claimant was dated April 28, 2011.

<sup>5</sup> P.H. Trans., Resp. Ex. 4 at 1.

his supervisor and was sent to get medical treatment at MedWorks. On January 17, 2011, claimant again complained of pain in his left wrist and forearm, and he was treated at MedWorks. Claimant never made any complaints of pain or injury to his right upper extremity.

Ms. Burris spoke with claimant about his accident of March 22, 2011, within a day or two after it occurred. She said he told her he was walking to the restroom and his right knee locked up, causing him not to be able to lift his leg, and he fell. He did not say anything about taking extra steps after the knee locked up, nor did he say he had tripped.

Ms. Burris knew at the time claimant was hired that he had cerebral palsy. She was not aware of any problems with claimant's right knee locking up before the accident of March 22, 2011. She was aware, however, that claimant had problems with his left knee before March 22, 2011, that were unrelated to work. In July 2010, claimant had brought in a work slip that indicated he was receiving treatment for his left knee. Also, when claimant was given a physical, claimant indicated that his left knee needed an operation.

#### PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>6</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>7</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection

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<sup>6</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>7</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>8</sup>

The majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.<sup>9</sup> In *Hensley*<sup>10</sup>, the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Martin*,<sup>11</sup> the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

In *Bennett*,<sup>12</sup> the claimant suffered an epileptic seizure while driving a motor vehicle for his employer and struck a tree. The Court of Appeals found:

Where the injury is clearly attributable to a personal condition of the employee, and no other factors intervene to cause or contribute to the injury, no compensation award is allowed; but where the injury is the result of the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.<sup>13</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>14</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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<sup>8</sup> *Id.* at 278.

<sup>9</sup> 1 Larson's *Workers Compensation Law*, § 7.04[1] (2003).

<sup>10</sup> *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

<sup>11</sup> *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

<sup>12</sup> *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

<sup>13</sup> *Id.*, 16 Kan. App. 2d 458, Syl. ¶ 2.

<sup>14</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>15</sup>

### ANALYSIS

The record offers two versions of how claimant's March 22, 2011 accident occurred. One is offered by the direct testimony of claimant. This version is that claimant tripped over an elevated crack in the concrete floor while walking on respondent's premises during his work shift. In this version, claimant's knee locking up was unrelated to his trip and fall. Claimant acknowledges that he drags his foot when he walks due to his cerebral palsy, but the trip was due to a hazard of employment, i.e. the crack in the concrete.

The second version is presented by respondent's witness, Ms. Burris, who related that claimant told her in March 2011 his fall resulted from his right knee having locked up, causing him to fall. Ms. Burris testified that claimant said nothing about tripping over a crack in the concrete when she spoke with him a day or two after his March 22, 2011 accident.

The first scenario is analogous with *Bennett*, where the injury was the result of the concurrence of a preexisting personal condition and some hazard of employment. This scenario would be compensable. In the second scenario, the injury is attributable solely to a personal condition of claimant and would not be compensable. Accordingly, which version of the facts is believed is determinative of the issue.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible.<sup>16</sup> Where there is conflicting testimony, as in this case, the credibility of the witness is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's witness testimony in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed his testimony over the testimony of respondent's witness. Deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*<sup>17</sup>, appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate

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<sup>15</sup> K.S.A. 2010 Supp. 44-555c(k).

<sup>16</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>17</sup> *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful.”<sup>18</sup>

This record presents a close question. Because preliminary benefits were awarded to claimant, the ALJ obviously found claimant’s testimony to be more credible than that given by Ms. Burris. After reading and considering their respective testimony, together with the exhibits, this Board Member agrees with the ALJ that claimant presents the more credible description of events.

#### **CONCLUSION**

Claimant suffered injury to his left lower extremity on March 22, 2011 by an accident that arose out of and in the course of his employment with respondent.

#### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 23, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2011.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant  
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge

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<sup>18</sup> *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).